

REMARKS/ARGUMENTS

Claims 1-31 were originally pending. Claims 1, 9, 17, and 22 have been amended to incorporate features of respective original claims 3, 11, 19, and 24, each of which have been canceled without prejudice. No claims have been added. Accordingly, claims 1-2, 4-10, 12-18, 20-23, and 25-31 remain pending. The claim amendments incorporate original subject matter from the canceled claims that the Office has already examined. For this reason, the claim amendments do not necessitate a new search. Additionally, while it is recognized that this is a response to a final action, Applicant is hopeful that this matter can be resolved, or at least a framework for resolving it can be laid, before an appeal or a continuation is filed. In light of the following comments, Applicant respectfully requests the Office to reconsider and withdraw the rejections to the pending claims. Alternatively, it is requested that the Examiner reconsider the pending claims on their merit and withdraw the "finality" of the July 30, 2004 rejection.

35 U.S.C §103

Claims 1-27 stand rejected under 35 U.S.C §103(a) over Payne et al. (U.S. Patent No. 5,519,869, hereinafter "Payne") in view of Lerche (U.S. Patent No. 6,457,175, hereinafter "Lerche"). This rejection is traversed.

As a preliminary matter, a previous Response filed on May 12, 2004 discussed the references of record at length, and demonstrated the allowability of the pending claims over the references of record. Those arguments are not repeated herein, but are incorporated by reference. The Office is urged to reconsider those arguments in light of the understanding gained from the following arguments.

1 **Claim 1** has been amended to incorporate the features of original claim 3.
2 Claim 1 recites in part “upon successfully operating the device and providing
3 external communications using the new essential software, selectively
4 downloading new non-essential software and storing the new non-essential
5 software in memory by overwriting at least a portion of either the essential
6 software or the non-essential software.” The Office has already examined these
7 features, and the Action (page 3) admits that Payne does not teach or suggest such
8 features. However, the Action concludes that in view of Lerche’s teaching of
9 “overwriting old non-essential software when downloading new non-essential
10 software” that the recited feature would have been obvious to one of ordinary skill in
11 the art since updated software that performs better usually replaces old software.
12 This conclusion is unsupportable.

13 It is respectfully submitted that Lerche merely teaches replacement of
14 software necessary for the operation of a system of Lerche with new software
15 necessary for the operation of the system of Lerche (i.e., replacing old essential
16 software with new essential software). Applicants’ specification at page 2 clearly
17 describes the difference between “essential software” and “non-essential
18 software”. Essential software is software necessary to operate a device and
19 provide external communications. Lerche teaches at col. 4, lines 27-32, that an
20 “application image 74 comprises a combination of (1) and embedded, real-time
21 operating system, such as [...], and (2) application software for operation of the
22 modem 16.” This is essential software. Lerche at col. 4, line 43 through col. 5,
23 line 5, merely describes that this essential software is replaced with new essential
24 software. Thus, a system of Lerche may never “upon successfully operating the
25 device and providing external communications using the new essential software,

1 selectively downloading new non-essential software and storing the new non-
2 essential software in memory by overwriting at least a portion of either the
3 essential software or the non-essential software”, as claim 1 recites.

4 Accordingly, and for this reason alone, the 35 USC §103(a) rejection of
5 claim 1 is improper and should be withdrawn.

6 Claims 2, 4-8, and 28 depend from claim 1 and are allowable over the
7 cited combination at least by virtue of this dependency. Moreover, these
8 dependent claims include additional features that are not taught are suggested by
9 the references of record.

10 For example, claim 8 recites “wherein the essential software includes
11 software selected from a group comprising an operating system, a file system, at
12 least one driver, a communication program, an Internet browser, and an upgrade
13 application”. The Action points to Lerche, col. 4, lines 27-32 to conclude that this
14 feature is taught by Lerche. This conclusion is unsupportable. Let’s take a look at
15 Lerche, col. 4, lines 27-32, wherein it is recited that an “application image 74
16 comprises a combination of (1) and embedded, real-time operating system, such as
17 [...], and (2) application software for operation of the modem 16.” Clearly, this
18 portion of Lerche that is relied upon is completely silent with respect to “a file
19 system, at least one driver, [...] an Internet browser, and an upgrade application”.
20 Thus, a system of Lerche may never include an application image that is “selected
21 from a group comprising [...]“a file system, at least one driver, [...] an Internet
22 browser, and an upgrade application”.

23 Accordingly, and for this additional reason, the 35 USC §103(a) rejection
24 of claim 8 is improper and should be withdrawn.

1 **Claim 9** recites “identifying essential software within a device, the
2 essential software including software necessary to operate the device and provide
3 external communications”, “identifying remaining portions of software within the
4 device as non-essential software”, “downloading new essential software from an
5 external source to the device and storing the new essential software in memory by
6 overwriting at least a portion of the non-essential software”, and “upon
7 successfully operating the device and providing external communications using
8 the new essential software, selectively downloading new non-essential software
9 and storing the new non-essential software in memory by overwriting at least a
10 portion of either the essential software or the non-essential software.” Claim 9 has
11 been amended to incorporate the features of original claim 11—features that the
12 Office has already examined. For the reasons are discussed above with respect to
13 claim 1, the cited combination of references does not teach or suggest these
14 claimed features.

15 Accordingly, the 35 USC §103(a) rejection of claim 9 is improper and
16 should be withdrawn.

17 **Claims 10, 12-16, and 29** depend from claim 8 and are allowable over the
18 cited combination at least by virtue of this dependency. Moreover, these
19 dependent claims include additional features that are not taught are suggested by
20 the references of record.

21 For example, **claim 16** recites “wherein the essential software includes
22 software selected from a group comprising an operating system, a file system, at
23 least one driver, a communication program, an Internet browser, and an upgrade
24 application.” For the reasons discussed above with respect to claim 8, Payne in
25 view of Lerche does not teach or suggest these recited futures.

1 Accordingly, and for this additional reason, the 35 USC §103(a) rejection
2 of claim 16 is improper and should be withdrawn.

3 Claim 17 has been amended to incorporate the features of original
4 claim 19—features that the Office has already examined. Amended claim 17
5 recites “identify as essential software that software which is necessary to operate
6 the apparatus and provide for external communications”, “identify remaining
7 portions of software as being non-essential software”, “download new essential
8 software from an external source and store the new essential software in memory
9 by overwriting at least a portion of the non-essential software”, and “upon
10 successfully operating and providing external communications using the new
11 essential software, selectively download new non-essential software and store the
12 new non-essential software in the memory by overwriting at least a portion of
13 either the essential software or the non-essential software.” For the reasons are
14 discussed above with respect to claim 1, the cited combination of references does
15 not teach or suggest these features of claim 17.

16 Accordingly, the 35 USC §103(a) rejection of claim 17 is improper and
17 should be withdrawn.

18 Claims 18, 20-21, and 30 depend from claim 17 and are allowable over the
19 cited combination at least by virtue of this dependency. Moreover, these
20 dependent claims include additional features that are not taught are suggested by
21 the references of record.

22 For example, claim 21 recites “wherein the essential software includes
23 software selected from a group comprising an operating system, a file system, at
24 least one driver, a communication program, an Internet browser, and an upgrade
25

1 application.” For the reasons discussed above with respect to claim 8, Payne in
2 view of Lerche does not teach or suggest these recited futures.

3 Accordingly, and for this additional reason, the 35 USC §103(a) rejection
4 of claim 21 should be withdrawn.

5 **Claim 22** has been amended to incorporate the features of original claim
6 19—features that the Office has already examined. Amended claim 24 recites
7 “identify as essential software that software which is necessary to operate the
8 client device and provide for external communications via the network, identify
9 remaining portions of software as being non-essential software, download new
10 essential software from the server device over the network and store the new
11 essential software in the memory by overwriting at least a portion of the non-
12 essential software, and upon successfully operating and providing external
13 communications using the new essential software, is further configured to
14 selectively download new non-essential software and store the new non-essential
15 software in the memory by overwriting at least a portion of either the essential
16 software or the non-essential software.” For the reasons are discussed above with
17 respect to claim 1, the cited combination of references does not teach or suggest
18 these features of claim 22.

19 Accordingly, the 35 USC §103(a) rejection of claim 22 is improper and
20 should be withdrawn.

21 **Claims 23, 25-27, and 31** depend from claim 22 and are allowable over
22 the cited combination at least by virtue of this dependency. Moreover, these
23 dependent claims include additional features that are not taught are suggested by
24 the references of record.

For example, claim 27 recites "wherein the essential software includes software selected from a group comprising an operating system, a file system, at least one driver, a communication program, an Internet browser, and an upgrade application." For the reasons discussed above with respect to claim 8, Payne in view of Lerche does not teach or suggest these recited features.

Accordingly, and for this additional reason, the 35 USC §103(a) rejection of claim 27 should be withdrawn.

Conclusion

In view of the above remarks, Applicant respectfully requests the Office to reconsider and withdraw the rejections to the pending claims. Alternatively, it is requested that the Examiner reconsider the pending claims on their merit and withdraw the "finality" of the July 30, 2004 rejection. Should any issue remain that prevents allowance of the application, the Office is encouraged to contact the undersigned prior to issuance of any advisory action.

Respectfully Submitted,

Dated: 8/25/2004

By: Brian G. Hart

Brian G. Hart

Reg. No. 44, 421

(303) 539-0265 x 241